(13) (13)

Nos. 89-1452, 89-1453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., *et al.*,
Petitioners,
v.
UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS IN NO. 89-1452

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August 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

66 pp

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QUESTION PRESENTED

Whether the court of appeals exceeded its reviewing authority or otherwise erred in vacating a nationwide program of the Federal Energy Regulatory Commission designed to increase production of "old" natural gas—*i.e.*, gas in the interstate market from wells drilled prior to 1977—and to eliminate severe distortions caused by the pre-existing ceiling price structure applicable to that gas. Specifically, whether the court of appeals applied an improper standard or otherwise erred:

(1) in setting aside, without regard to the plain statutory language and based solely on the court's reading of the legislative history, the Commission's determination that the Natural Gas Policy Act of 1978 permits the Commission to modify the pre-existing pricing scheme by setting a single, higher ceiling price for old gas;

(2) in setting aside the Commission's determination that the Natural Gas Act authorizes the Commission to specify by rule, rather than case-by-case adjudication, the circumstances in which the Commission will permit abandonment of a facility or service subject to its jurisdiction; and

(3) in requiring the Commission finally to solve, in *this* proceeding, another natural gas policy issue already being addressed in other proceedings—the issue of "take-or-pay" provisions in gas contracts—as a precondition to the Commission's effort to resolve the problem of old gas pricing.

LIST OF PARTIES

A list of parties was provided at Appendix F to the petition for certiorari in No. 89-1452.

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BRIEF OF PETITIONERS IN NO. 89-1452

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a), together with the dissenting opinion of Judge Brown (Pet. App. 36a-57a), is reported at 885 F.2d 209 (5th Cir. 1989). Order No. 451 of the Federal Energy Regulatory Commission (J.A. 5-205) is reprinted at 51 Fed. Reg. 22,168 (1986). Order No. 451-A of the Federal Energy Regulatory Commission (J.A. 206-436) is reprinted at 51 Fed. Reg. 46,762 (1986).

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1989. Rehearing was denied on December

15, 1989. Pet. App. 58a. This Court granted certiorari on June 4, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 104(b)(2) of the Natural Gas Policy Act of 1978, which in all relevant respects is identical to Section 106(c) of the same Act, provides:

> **Ceiling prices may be increased if just and reasonable.**—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicaable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—
>
> (A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and
>
> (B) just and reasonable within the meaning of the Natural Gas Act. 15 U.S.C. § 3314(b)(2); see also 15 U.S.C. § 3316(c).

Section 7(b) of the Natural Gas Act of 1938 provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment. 15 U.S.C. § 717f(b).

STATEMENT

This case concerns the exhaustive efforts of the Federal Energy Regulatory Commission ("Commission" or "FERC") to develop a rational and efficient nationwide program for regulating "old" natural gas—generally, gas in the interstate market from wells drilled before 1977. Following lengthy deliberations over an extensive administrative record, and after a full public hearing, the FERC adopted Orders No. 451 and 451-A (collectively "Order 451"). Order 451 is a carefully crafted set of

regulations designed to relieve serious market distortions and consumer inequities created by the Commission's prior old gas pricing regime. The Commission predicted that those regulations would reduce overall natural gas prices by, among other things, increasing supplies of old gas available to the national gas market and increasing competition among sellers. Such price reductions have in fact occurred during the three years since Order 451 became effective. See *infra* note 3. These beneficial effects notwithstanding, the majority below held that the Commission lacked statutory authority to implement its new regulatory regime.

1. *Regulation of Natural Gas Prior to the NGPA.* The fundamental errors in the court of appeals' decision are best understood in light of the history of natural gas regulation. Prior to 1978, prices for natural gas sold in interstate commerce were regulated exclusively under the Natural Gas Act of 1938 ("NGA"). 15 U.S.C. §§ 717-717w. Beginning in the 1960s, FERC's predecessor, the Federal Power Commission ("FPC") instituted a system of area-wide wellhead ceiling prices for natural gas. The FPC established these ceiling prices according to a system of "vintage" pricing under which a lower ceiling price applied to gas that had already been dedicated to interstate commerce—what was then considered "old" gas—and another, higher ceiling applied to "new" gas. Originally, the vintage pricing system was intended to increase natural gas supplies through higher ceilings on new gas, while moderating price increases to consumers through lower ceilings on existing supplies. See Opinion No. 468, 34 F.P.C. 159, 185-88 (1965); see also J.A. 27; Pet. App. 9a.

From the outset, both the FPC and the courts consistently treated vintage pricing as a temporary expedient which the FPC, exercising its broad ratemaking discretion under the NGA, remained free to modify or eliminate as experience and regulatory needs changed. See Statement of General Policy No. 61-1, 24 F.P.C. 818, 819 (1960). In upholding the FPC's system of area

rates, for example, this Court made clear that the NGA does not prescribe any particular regulatory formula or methodology, including vintage pricing. *Permian Basin Area Rate Cases*, 390 U.S. 747, 775-77, 799-800 (1968). Accordingly, the FPC received judicial approval when it implemented its 1972 conclusion that vintaging was "an anachronism which we should now move to eliminate." Opinion No. 639, 48 FPC 1299, 1309 (1972), *aff'd sub nom. Shell Oil Co.* v. *FPC*, 491 F.2d 82, 88 (5th Cir. 1974); see Opinion No. 699-H, 52 FPC 1604, 1631-32 (1974), *aff'd sub nom. Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976). The court of appeals also approved when the FPC, having reinstated vintage pricing in 1976, consolidated a number of the most outdated vintages into a single vintage category for all gas already under production before 1973. Opinion No. 749, 54 FPC 3090 (1975), *aff'd sub nom. Tenneco Oil Co.* v. *FERC*, 571 F.2d 834 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978). Despite that consolidation, the FPC's vintage pricing structure still contained 16 different categories of old gas—each with its own ceiling price—when the FERC inherited the FPC's regulatory authority in 1977. J.A. 223.

2. *The NGPA and its Aftermath.* The vintage pricing structure contributed to the acute gas shortages that plagued the interstate market during the 1970s. Ceiling prices for many categories of gas were artificially low. Those prices, in turn, generated a steady increase in demand for natural gas and a concomitant decrease in the supply available to the interstate market. This reduction in supply was exacerbated by intense competition from an unregulated intrastate gas market and by the ever-increasing cost and risk of exploring for and developing new gas supplies. Moreover, periodic rate reviews by the FPC and the FERC were cumbersome and costly, and failed to keep pace with the fast-changing market.[1]

[1] See generally S. Williams, *The Natural Gas Revolution of 1985* 1 (1987); Pierce, *Reconstituting the Natural Gas Industry From Wellhead To Burnertip*, 9 Energy L.J. 1, 8-11 (1988).

To forestall an imminent natural gas supply crisis, Congress in 1978 enacted the Natural Gas Policy Act ("NGPA"). The NGPA was designed to eliminate gas shortages in the interstate market and to streamline and rationalize the regulatory process. *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 330-31 (1983). Abandoning the assumption of monopoly power on which the prior regulatory regime had been built, Congress determined that the producing segment of the natural gas industry was workably competitive. *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 420-21 (1986). Accordingly, Congress immediately provided higher price ceilings for "new" natural gas and enacted a scheme of phased deregulation for most of that gas. 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301 *et seq.*).

Congress, however, did not itself undertake to restructure the pre-existing ceiling prices for old gas. Instead, it modified the existing structure in two respects. First, in NGPA Sections 104 and 106, Congress adopted initial ceiling prices that had as their starting point the most recent ceilings established by the Commission pursuant to the NGA's just and reasonable standard; these ceilings were to be adjusted automatically for inflation. 15 U.S.C. §§ 3314(b)(1), 3316(a). Second, Congress "recognize[d] that the ceiling[s] may be too *low* and authorize[d] the Commission to raise" them pursuant to certain statutory criteria. *Mid-Louisiana Gas Co., supra*, 463 U.S. at 333. Specifically, Sections 104(b)(2) and 106(c) expressly authorized the Commission, "by rule or order," to change the ceiling prices for "any natural gas . . . or category thereof . . . otherwise subject to [Sections 104 and 106]," conditioned only by two requirements: (1) that the new ceiling be higher than the ceiling set by the NGPA, and (2) that it be "just and reasonable" within the meaning of the NGA. 15 U.S.C. §§ 3314(b)(1), 3316(a). Congress enacted this provision against the background of the FERC's prior reliance upon the just and reasonable standard of the NGA, not only to increase ceiling prices, but also to modify and, at times, eliminate the vintage

pricing structure applicable to old gas. See, *e.g.*, Opinion No. 639, *supra;* Opinion No. 699-H, *supra;* Opinion No. 749, *supra.*

3. *The Secretary of Energy's Proposal.* By 1985, as a result of the price incentives offered by the NGPA, the gas shortages of the 1970s had been overtaken by substantial increases in supply. This caused a substantial reduction in prices at the wellhead. Yet market rigidities created by the existing regulatory structure prevented these reductions from being passed on to consumers in the form of substantially lower "burnertip" prices.

Accordingly, in a 1985 notice of proposed rulemaking issued under Section 403 of the Department of Energy Organization Act (42 U.S.C. § 7173(a)), the Secretary of Energy urged the Commission to use its statutory authority to reassess and, if necessary, to modify the pricing of old gas. 50 Fed. Reg 48,540 (1985). The Secretary observed that artificially low old gas prices under the vintage pricing system were causing producers to forsake old wells in favor of investment in new wells, which, although more expensive, were more profitable because of higher price ceilings. 50 Fed. Reg. at 48,543. In the Secretary's view, this distortion of producer incentives hurt consumers because it forced them to pay more for natural gas, on average, than they otherwise would. 50 Fed. Reg. at 48,543-44. The Secretary also noted that vintage pricing of old gas had created what he characterized as a "gargantuan inequity" in the treatment of consumers in various parts of the country: It forced consumers whose suppliers did not have significant inventories of low-priced old gas to pay substantially more than other gas customers. 50 Fed. Reg. 48,541.

In sum, the Secretary argued that vintage pricing of old gas was an "unnecessary anachronism" that can be understood only as an "accident of an historic ratemaking process that was ultimately unsuccessful in accomplishing its stated objectives of ensuring an adequate supply of natural gas for consumers at reasonable prices while providing a reasonable return and incentive for

producers." 50 Fed. Reg. at 48,542. The Secretary therefore urged the Commission to use its authority under Sections 104(b)(2) and 106(c) to eliminate vintage pricing of old gas. 50 Fed. Reg. at 48,545.

4. *The Commission's Orders.* The Commission analyzed approximately 113 sets of comments and held two days of public hearings on the Secretary's proposal. At the conclusion of those hearings, the Commission issued Order 451, which was later clarified in Order 451-A.

In its orders, the Commission found that vintage pricing of old gas was inequitable because it required consumers in some areas of the country to pay substantially more than similarly situated consumers in other areas. J.A. 25, 227.[2] Moreover, because of the pipelines' ability to average or "roll in" prices for higher-cost gas supplies with prices for lower-cost supplies, consumers were not realizing the benefits of artificially low prices for old gas. J.A. 25, 229-30. The Commission also found that artificially low prices were skewing development and recovery efforts away from old gas even though that gas is cheaper to produce than new gas. This, the Commission found, was causing producers to forsake old gas wells prematurely. J.A. 24, 227-28.

The Commission further found that collapsing the vintage pricing structure of old gas would benefit consumers. The Commission estimated that, during the following decade, that action would lead to the production of 11 Tcf of additional old gas, resulting in savings to consumers of approximately $25 billion. J.A. 16, 99, 295-60; 50 Fed. Reg. at 48,540. The Commission also found that collapsing the vintage pricing structure for old gas would reduce overall prices for the vast majority of consumers, even though it would temporarily increase prices in a

[2] The Commission noted, for example, that consumers in the Washington, D.C. area were paying their local distribution companies $8.05/Mcf, while consumers in Kansas, whose suppliers had access to substantial old gas, were paying $4.49/Mcf. See J.A. 25; see also Pet. App. 39a-40a n. 2 (Brown, J., dissenting).

few regions where gas prices were artificially low. See J.A. 119-37. In fact, average prices for natural gas *have* substantially decreased since Order 451 went into effect, just as the FERC predicted.[8]

Order 451 has three principal and interrelated components:

a. *Ceiling Prices For Old Gas.* First, acting pursuant to its express authority under Sections 104(b)(2) and 106(c) of the NGPA, the FERC established a single ceiling price that potentially applied to all vintages of old gas. In so doing, FERC did not abolish the existing price ceilings under Sections 104 and 106, because a producer was not permitted to collect the new maximum price without first meeting several significant conditions. See *infra* p. 10. For that reason, the FERC referred to the new ceiling as an "alternative ceiling price." *E.g.*, J.A. 9. Moreover, the FERC did not eliminate the overall vintage pricing structure established in the NGPA; instead, it kept the alternative ceiling price for old gas below the ceilings applicable to the other categories of gas (*e.g.*, "new" gas). See, *e.g.*, J.A. 41-42, 222. The Commission merely consolidated all of the multiple vintage categories—or "subvintages"—of old gas into a single vintage category subject to a single, already-existing ceiling price. It thereby eliminated vintage pricing *only* within the category of gas covered by Sections 104 and 106, and *only* to the extent a producer could satisfy the

[8] Average residential retail prices declined from an annual average of $5.83 per Mcf in 1986 to an annual average of $5.63 in 1989, a reduction of 3 percent before adjusting for inflation, and approximately 15 percent after adjusting for inflation. Wellhead prices (*i.e.*, prices charged by producers) have declined from an annual average of $1.94 per Mcf in 1986 to an annual average of $1.71 in 1989, a reduction of 12 percent before adjusting for inflation, and approximately 25 percent after adjusting for inflation. See U.S. Dept. of Energy, Energy Information Admin., *Natural Gas Monthly* 33 (March 1990) (Table 4) ("EIA Report"); Joint Economic Comm., *Economic Indicators* 23 (May 1990) (consumer price index increased from 109.6 in 1986 to 124.0 in 1989).

conditions for charging a rate up to the new, alternative maximum price.

Several times the Commission expressly addressed the scope of its authority under Sections 104(b)(2) and 106(c) to set a single ceiling price for all old gas. The Commission concluded that its action was authorized by Congress because "the express and unambiguous terms" of those provisions "specifically authorize the Commission to raise old gas prices, subject only to the requirement that the Commission find that the higher rates are just and reasonable within the meaning of the NGA." J.A. 50; see also J.A. 18, 31, 216. The Commission found no support for, and therefore rejected, suggestions that certain isolated statements during the Senate and House debates on the NGPA indicated a congressional intent to preclude the FERC from eliminating vintage pricing of old gas. J.A. 50, 219-21. It also rejected arguments that it was in effect "deregulating" old gas: It explained that it was retaining both (a) a ceiling price applicable to that gas and (b) its authority to change that ceiling price—or even reinstate vintage pricing—if it determined that the ceiling price was no longer just and reasonable. See, *e.g.*, J.A. 171, 219-22.

The maximum price was set at $2.57 per million Btus ("MMBtu"), the existing ceiling price for the most recent (*i.e.*, the post-1974) old gas vintage. The Commission found this to be a just and reasonable price for all gas subject to Sections 104 and 106: It concluded, based upon two cost studies, that this price generally approximated the replacement cost of gas. See J.A. 76, 233-34. In contrast to historic costs, replacement cost measures the current cost of finding new gas fields, drilling new wells and producing new gas. J.A. 75, 237-38. The Commission found that replacement cost is an appropriate benchmark for setting a just and reasonable ceiling price for old gas because it best represents the marginal opportunity cost of using existing gas supplies. J.A. 83, 248. The Commission also noted that the courts had previously affirmed the Commission's reliance upon replacement cost methodology

in establishing just and reasonable rates. J.A. 74-75 (citing *Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976)). The Commission, however, permitted producers to collect a price above the old ceiling *only* if the purchaser agreed, after the issuance of Order 451, to pay a higher price, either under its existing contract or in a new contract. J.A. 141-142.

b. *The GFN Procedure and Abandonment.* As its second principal element, Order 451 requires producers to enter into negotiations with their pipeline purchasers before they can collect a higher price, even when the parties' existing contract would permit the producer, without further negotiations, to collect a price higher than the prior ceiling. J.A. 141, 295. If the parties are unable voluntarily to negotiate a new or amended contract price, Order 451 specifies a structured "good faith negotiation" ("GFN") procedure with which producers must comply before charging a price in excess of the prior ceiling, and which they may invoke *only* if they have preexisting contractual authority for charging a higher price. *Id.* To provide pipelines with additional bargaining power, Order 451 grants them the right, in response to a producer's invocation of the GFN procedure, to require the producer to renegotiate the prices previously agreed upon for any other gas (including new, deregulated and "high-cost" gas) in any contract that covers at least some old gas (*i.e.*, a "multivintage" contract). J.A. 151-52. The Commission anticipated that this procedure would act as a stimulus for producers and pipelines voluntarily to restructure their contractual relationships so that the prices paid for all natural gas would be more market responsive. J.A. 319-21.

The Commission also held that, in cases where the parties are unable to agree on a new price for sales of old or new gas after compliance with the GFN procedure, either the producer or the pipeline may abandon its existing obligations, thereby making the gas at issue available to the market. The Commission found that abandonment in these circumstances would further the "public

convenience and necessity," as required by Section 7(b) of the NGA. J.A. 147. The Commission based this conclusion upon the substantive standard it had previously announced in *Felmont Oil Corp. and Essex Offshore, Inc.*, 33 FERC ¶ 61,333 at 61,657 (1985), *rev'd and remanded on other grounds sub nom. Consolidated Edison Co.* v. *FERC*, 823 F.2d 630 (D.C. Cir. 1987). Under that standard, the Commission's abandonment decision is based upon the "overall needs of the market" rather than on the "comparative needs" of the affected customers. J.A. 22, 147.

The Commission also found that abandonment under the GFN procedure satisfies all of the *procedural* requirements of Section 7(b). The Commission concluded that the "due hearing" requirement in Section 7(b) "does not require that the Commission hold individual case-by-case hearings" where an abandonment satisfies the FERC's pre-established criteria. J.A. 147. The Commission also rejected claims that granting abandonment under the GFN process is contrary to *United Gas Pipe Line Co.* v. *McCombs*, 442 U.S. 529 (1979). J.A. 306-07. In short, the Commission held that Section 7(b) permits it to authorize abandonments by administrative rule, without case-by-case adjudication. J.A. 307-09.

c. *Take Or Pay.* Finally, the Commission rejected suggestions that it should undertake to resolve completely the issue of take-or-pay provisions in certain natural gas contracts at the same time and in the same proceeding in which it addressed old gas pricing.[4] The Commission explained that it was already addressing the take-or-pay issue in its Order 436 proceedings. J.A. 292-95. The Commission also explained that, by permitting increased ceiling prices for old gas, Order 451 would allow pipe-

[4] Since the 1950s, many pipelines entered into long-term contracts requiring them to take a specified volume of gas or, in the event the gas was not taken, to pay for the specified volume. See, *e.g.*, Pierce, *supra*, at 15. Contracts which include such provisions are commonly referred to as "take-or-pay" contracts.

lines to offer producers higher prices for old gas in exchange for renegotiation of take-or-pay obligations, thereby facilitating settlement of take-or-pay disputes. J.A. 120-21. The Commission further found that the "release" to the market of old gas abandoned under Order 451 would decrease the market price of new gas and thereby reduce the aggregate value of pipelines' take-or-pay obligations. J.A. 122. In short, the Commission rejected the suggestion that the take-or-pay issue was so intertwined with vintage pricing of old gas as to require the Commission to take any further steps to resolve both issues in this proceeding. J.A. 292-93.

5. *The Decision Below.* On September 15, 1989, a divided panel of the court of appeals vacated the Commission's orders. No member of the panel disputed the findings of the FERC concerning the likely benefits of collapsing the vintage pricing structure of old gas. See, *e.g.*, Pet. App. 23a. Indeed, the majority agreed that the end result of the Commission's action was "arguably meritorious." Pet. App. 25a. The majority nonetheless held that the Commission had exceeded its statutory authority in three respects relevant here.

First, the majority concluded that Congress did not intend to give the Commission authority in Sections 104 (b)(2) and 106(c) to set a single ceiling price for all old gas. Pet. App. 23a-24a. According to the majority, vintage pricing of old gas is too "significant [a] feature of the NGPA" to be "jettison[ed]" by the Commission. Pet. App. 25a. The court of appeals also expressed the view that the ceiling price set by the Commission was impermissible because it was higher than the spot market price when Order 451 was issued and therefore, in the majority's view, amounted to "de facto deregulation." Pet. App. 14a n.15, 19a. Eschewing the plain statutory language, and deferring not at all to the Commission's interpretation of that language, the majority relied upon its own perception that the NGPA reflected a "congressional compromise" forever to preserve the existing pricing structure for old gas. See Pet. App. 19a-25a.

Second, the majority rejected the abandonment procedure adopted in Order 451. Without deferring to the Commission's interpretation of Section 7(b), the majority held that the Commission lacks authority under that statute to "provid[e] for an across the board, preauthorized abandonment provision" (Pet. App. 29a), notwithstanding the Commission's determination that abandonments pursuant to Order 451 satisfied the "public convenience and necessity" requirement of the NGA. Furthermore, relying upon *United Gas Pipe Line Co.* v. *McCombs*, 442 U.S. 529 (1979), the majority held that Order 451 violates Section 7(b) because, in its view, that gives the producer too much control over the abandonment decision. Pet. App. 28a-29a.

Third, the majority castigated the Commission for failing to resolve the take-or-pay issue in the Order 451 proceeding. Pet. App. 29a. Although it implicitly recognized that the Commission was already addressing the take-or-pay issue on remand from the D.C. Circuit's decision in *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), the majority contended that the Commission's decision not to resolve that issue in Order 451 was a "regrettable and unwarranted" refusal to deal with a major problem. Pet. App. 32a.

Judge Brown strongly dissented from each of these holdings. He observed that the fundamental flaw in the majority's entire analysis was its decision to "[s]ubstitute[] its own judgment for that of the Commission on what Congress has ordained the Commission may do about the grave problems of the natural gas business." Pet. App. 37a.

SUMMARY OF ARGUMENT

The regulatory regime created by Order 451 is a carefully considered, balanced and lawful response to the severe distortions caused by the pre-existing ceiling price structure applicable to old gas. The Commission reasonably concluded that those distortions were inhibiting the

production of natural gas and, at the same time, were forcing consumers to pay higher prices than they otherwise would pay.

In vacating Order 451, the majority repeatedly violated two well-settled principles: First, a court may not rely upon its own view of the broad "purposes" underlying a statute to override the statute's plain meaning (*e.g.*, *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987)) or to overturn the administering agency's reasonable construction of the statutory language (*e.g.*, *K Mart Corp.* v. *Cartier Inc.*, 486 U.S. 281, 291-92 (1988)). Second, an administrative agency is entitled to judicial deference, not only in interpreting its own organic statutes (*e.g.*, *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984)), but also in determining how best to carry out its statutory mandate (*e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978); *Heckler* v. *Chaney*, 470 U.S. 821 (1985)). The majority's refusal to adhere to these fundamental principles pervades its analysis of the three issues presented in this case.

I.

The lawfulness of the Commission's decision to adopt a single ceiling price for all old gas can and should be decided on the sole basis of the NGPA's plain language. The Commission's decision fully complies with the only two requirements imposed by the language of Sections 104(b)(2) and 106(c): (1) the Commission's ceiling price for old gas is higher than the corresponding ceiling set by the NGPA for that category of gas; and (2) the Commission properly found that the new ceiling is "just and reasonable" within the meaning of the NGA. The Commission's compliance with all applicable statutory requirements is the complete answer to the majority's view that the pricing aspects of Order 451 are somehow defective because they allegedly give rise to "de facto deregulation."

The plain language of Sections 104(b)(2) and 106(c) also refutes the majority's conclusion that the Commission lacks the authority to set a single ceiling price for

all old gas and to collapse the vintage pricing structure within that category. By their terms, those provisions authorize the Commission, "by rule or order," to set "*a* maximum lawful ceiling price" for "any category" of old gas. 15 U.S.C. §§ 3314(b)(2), 3316(c) (emphasis added).

The *only* constraint on the Commission's authority to increase the ceiling price for a category of old gas is the requirement that the resulting ceiling be "just and reasonable." *Id.* But that "limitation," which in fact is a broad delegation of authority, does not foreclose setting a single ceiling price for all old gas. The statute authorizes the Commission, in its discretion, to adopt any ratemaking methodology—including one based upon replacement costs—that yields a "reasonable" rate. Thus, although Congress could easily have limited the Commission's discretion to modify the existing pricing structure for old gas, it did not do so. Instead, it preserved the Commission's preexisting authority under the "just and reasonable" standard of the NGA to modify or even abolish vintage pricing, as the Commission had done with judicial approval in the past. See *supra* pp. 3-4. And if there were any conceivable doubt on the issue, the court of appeals was obligated to defer to the Commission's interpretation of the statute, something the majority failed to do.

II.

The majority's analysis of the abandonment issue is similarly flawed. The substantive abandonment standard applied by the Commission—the "overall needs of the market" standard—is not at issue in this case. Instead, the sole issue is whether the Commission's procedures are adequate under Section 7(b). The Commission, however, fully complied with all three procedural requirements imposed by Section 7(b): It approved the abandonment; it found that abandonment under Order 451's GFN procedure would be consistent with the "present or future public convenience or necessity"; and it granted its approval only after a rulemaking "hearing." See 15 U.S.C.

§ 717f(b). The plain statutory language thus disposes of the abandonment issue.

There is no merit to the majority's view that Section 7(b) nonetheless requires the Commission to conduct a case-by-case inquiry into *each* abandonment before giving final approval. By its terms, Section 7(b) does not require any specific kind of "hearing." Indeed, it grants the Commission discretion to determine what kind of inquiry is "due." Here the Commission reasonably concluded that a case-by-case inquiry is unnecessary in light of the substantive standard it was applying. Moreover, the majority's attempt to engraft a case-by-case inquiry requirement onto Section 7(b) is precluded by several decisions of this Court. *E.g.*, *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39-41 (1964). The majority also misinterpreted this Court's decision in *United Gas Line Co.* v. *McCombs*, 442 U.S. 529 (1979), in denying the Commission the authority to pre-grant abandonment whenever, in the opinion of a reviewing court, the Commission's procedures give too much "control" to one side or the other.

III.

The majority's requirement that the Commission fully resolve the take-or-pay issue as a prerequisite to resolving the old gas pricing issues resolved in Order 451 improperly interferes with the Commission's discretion to manage its priorities as it deems appropriate. *E.g.*, *Vermont Yankee*, 435 U.S. at 543; *Heckler*, 470 U.S. at 831-32. The court's interference with the Commission's Order 451 program is especially inappropriate because FERC is *already* attempting fully to resolve the take-or-pay issue in other proceedings, and because FERC reasonably concluded in this case that Order 451 would do more to improve the take-or-pay situation than to worsen it. But even if the majority's contrary assessment were correct, the mere fact that a resolution of one issue "exacerbates" another regulatory issue provides no basis for a court to *require* the agency to address both issues in the same proceeding.

ARGUMENT

I. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO INCREASE OLD GAS CEILING PRICES AS IT DID IN ORDER 451.

The heart of Order 451 is its modification of ceiling prices for old gas pursuant to Sections 104(b)(2) and 106(c) of the NGPA. By their terms, those provisions authorize the Commission to establish a ceiling price other than that adopted by the NGPA, provided the ceiling satisfies two requirements: (1) it must be higher than the ceiling set by the NGPA for that category of gas; and (2) it must be "just and reasonable" within the meaning of the NGA. See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, *supra*, 463 U.S. at 333-34. The Commission fully complied with both requirements in adopting the ceiling price imposed by Order 451: The ceiling price set by the Commission is higher than (or equal to) the NGPA ceiling prices applicable to all categories of old gas affected by Order 451, and the Commission reasonably found that this price was just and reasonable based upon settled ratemaking principles. Under the plain statutory language, that ends the inquiry.

The court of appeals nonetheless concluded that the Commission lacks authority under Sections 104 and 106 to "abrogat[e] the vintage pricing structure" (Pet. App. 25a) by setting a single ceiling price for all vintages of old gas. The majority also suggested that the ceiling price chosen by the FERC is inconsistent with congressional intent because it is above the spot market price that existed when Order 451 was promulgated and therefore, in the majority's view, "allow[s] for de facto [de]regulation of old gas." Pet. App. 19a. There is no merit to either of these specific complaints. Nor is there any merit to the majority's view that the Commission's action is contrary to a speculative "congressional intent," which the majority derived from its interpretation of legislative history but did not—and could not—find anywhere in the statutory text. Pet. App. 19a-22a.

A. The Plain Language Of Sections 104 and 106 Gives The Commission Authority To Set A Single Ceiling Price For All Vintages Of Old Gas.

The short answer to the court of appeals' analysis of the vintage pricing question is that the Commission has express authority under Sections 104 and 106 to increase the ceiling price for any "category"—including any vintage—of old gas, provided *only* that the resulting ceiling is "just and reasonable." Because there is nothing in the "just and reasonable" standard that requires different ceilings for different vintages of old gas, the Commission's authority to set a single ceiling price for all old gas follows from the plain statutory language. Under this Court's decisions, that is the end of the matter. *E.g., K Mart*, 486 U.S. at 291-92. And if there were any doubt about the issue, the Commission's interpretation of those sections must be upheld because it is, at a minimum, a reasonable interpretation of the statutory language. *Chevron*, 467 U.S. at 844.

1. Sections 104(b)(2) and 106(c) unambiguously authorize the Commission to increase the ceiling price for "*any natural gas* [governed by Sections 104 and 106] (*or category thereof, as determined by the Commission*)." 15 U.S.C. § 3314(b)(2), § 3316(c) (emphasis added). Those provisions, moreover, give the Commission the "sweeping" authority (see Pet. App. 47a (Brown, J., dissenting)) to raise ceiling prices 'by rule or order." 15 U.S.C. § 3314(b)(2), § 3316(c). Because these provisions grant the Commission authority to increase ceiling prices for an entire "category" of gas, and to do so through rulemaking (*i.e.*, "by rule") as well as through case-by-case adjudication (*i.e.*, "by order"), this authority is obviously not limited to case-by-case "special relief," as the court of appeals suggested. See Pet. App. 24a n.24.[5]

[5] Special relief is expressly available under Section 502(c) of the NGPA. See 15 U.S.C. § 3412(c). The court of appeals' suggestion that Sections 104(b)(2) and 106(c) are limited to special relief would render Section 502(c) redundant, contrary to settled prin-

And, because each old gas vintage constitutes a "category" of old gas, the Commission is authorized to increase the ceiling price for an entire vintage of old gas. The only questions, therefore, are whether anything in Sections 104(b)(2) and 106(c) prevents the Commission from (a) increasing the ceiling price for multiple old gas vintages simultaneously, and (b) setting the ceiling price applicable to each vintage at the same level.

The Commission's authority to increase the ceiling prices for multiple old gas vintages simultaneously cannot be seriously disputed. The authority to increase the ceiling price for "*any* . . . category" of old gas necessarily encompasses the authority to increase the ceiling price for multiple categories or, indeed, for *all* categories. See, *e.g., United States* v. *Lee Stoller Enters., Inc.*, 652 F.2d 1313, 1317 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981) ("The word 'any' . . . has a comprehensive meaning of 'all or every' ").[6]

The Commission's authority to set the ceiling price applicable to each vintage at the same level is also clear from the statutory language. Sections 104(b)(2) and 106(c) permit the Commission to "prescribe *a* maximum lawful ceiling price, applicable to any . . . category" of gas. 15 U.S.C. §§ 3314(b)(2), 3316(c) (emphasis added). Inasmuch as "any" encompasses "all," this language gives the Commission discretion to set a single ceiling price for any combination of categories.[7] Sections

ciples of statutory interpretation. See, *e.g., Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

[6] See also, *e.g., County of Loudoun* v. *Parker*, 136 S.E. 2d 805, 809 (Va. 1964) (absent limitation, "any" in statute encompasses "all") (citing Black's Law Dictionary, 3d ed. and Webster's 3d New International Dictionary).

[7] Moreover, the word "category" is broader than "vintage." It can mean, for example, the broad "category" of all old gas or all new gas. *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 372 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982); see also Order No. 72, Final Regulations Implementing Section 109 of the National Gas

104(b)(2) and 106(c) therefore give the Commission express authority to set "*a* maximum lawful ceiling price" for all old gas. The statutory language could hardly be more expansive or more plain.

2. The Commission's decision to collapse vintage pricing of old gas is also fully consistent with the "just and reasonable" requirement of Sections 104 and 106. Certainly, nothing in that language suggests any obligation on the Commission's part to retain multiple ceiling prices for different old gas vintages. To the contrary, the history of vintage pricing under the NGA's "just and reasonable" standard demonstrates that Congress's inclusion of that standard in the NGPA is less a limitation than it is a broad grant of ratemaking authority.

Vintage pricing—*i.e.*, a system in which ceiling prices vary inversely with the length of time a gas well has been in production—is not an inherently necessary feature of natural gas regulation. Indeed, as previously explained (*supra* pp. 3-4), the Commission had declined to use it on several occasions prior to the NGPA. It was largely the product of "original" or "historic" cost ratemaking applied on a regional or nationwide basis. See J.A. 74; Pierce, *supra* note 1, at 9. The original policy justification for vintage pricing was the belief that, by preserving lower prices for gas from "older" wells, this system would moderate the impact on consumers of higher prices attributable to increased costs for newer production by creating an "average" price below the cost of the new gas. At the same time, it was thought that this system would provide adequate price incentives for the discovery and production of new gas. See *supra* p. 3.

In Order 451, however, the Commission found that substantial changes in natural gas markets had rendered the existing vintage pricing system unjust and unreasonable as applied to old gas. J.A. 61, 223. Far from in-

Policy Act, FERC Stats. & Regs. (CCH) ¶ 30,135 at 30,964 (1980) (using "category" to refer to all new and deregulated gas).

sulating consumers from higher prices, the Commission found that the vintage pricing structure was depressing the overall supply of natural gas and thereby increasing its average price. See *supra* p. 7. Neither the majority below nor the respondents have challenged that finding, the correctness of which is confirmed by the substantial decline in average gas prices since Order 451 collapsed the vintage pricing structure. See *supra* note 3. The Commission also determined that, in order to elicit the maximum supply of old gas, the ceiling price for that gas should be determined on the basis of replacement costs. J.A. 78-83, 250. Replacement cost is the current cost of finding, developing and producing natural gas. J.A. 75, 248-50. Because the replacement cost of all natural gas is the same regardless of the date it was placed in production, the Commission's methodology necessarily collapsed the vintage pricing structure within the affected category of gas, *i.e.*, old gas. Indeed, the Commission's earlier decisions to eliminate vintage pricing among various categories of old gas had employed a replacement cost-based methodology to the same effect. See *supra* p. 4.

Flowing as it does from the Commission's use of a replacement cost-based methodology, the Commission's decision to collapse vintage pricing of old gas is unquestionably within its authority under the just and reasonable standard. First, this Court has held that the just and reasonable standard does not bind the Commission "to the use of any single formula or combination of formulae in determining rates." *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942); *Permian, supra*, 390 U.S. at 775-77, 790, 799-800; *Mobil Oil Co.* v. *FPC*, 417 U.S. 283, 308 (1974). Thus, the Commission is entitled to the widest discretion in choosing the methodology used in setting ceiling prices, and this Court has consistently upheld the Commission when it has shifted from one methodology in favor of another one. *Hope*, 320 U.S. at 602; *Permian*, 390 U.S. at 799-800; see also

Tenneco Oil Co. v. *FERC*, 571 F.2d 834, 840 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978) ("Insofar as theories of regulation are concerned, the choice between actual cost and replacement cost is for the Commission to make . . .").

Second, replacement cost is a well-established basis for establishing just and reasonable rates. The Commission employed a replacement cost-based method in several proceedings prior to the enactment of the NGPA, and was affirmed on appeal each time. *E.g.*, *Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1082-83 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976); *American Public Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1059 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *Tenneco Oil*, *supra*. This Court, moreover, has previously recognized the validity of ratemaking methodologies based upon current or projected costs (like the replacement cost methodology used by the Commission here) rather than historic costs. *E.g.*, *Permian*, 390 U.S. at 792. Thus, the "just and reasonable" standard of the NGA plainly permits the Commission to rely upon replacement costs to set a single ceiling price applicable to all old gas vintages.[8]

In light of the Commission's well-established discretion to depart from historic cost ratemaking under the NGA's just and reasonable standard, Congress's decision to incorporate that standard into the NGPA precludes any contention that Congress intended to limit the Commission's authority to modify or eliminate vintage pricing of old gas. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) (terms of art appearing in statute should be given their commonly understood meaning). By expressly granting the Commission the same well-defined powers in the NGPA, Congress ensured that the Commission would retain the ability, *inter alia*, to collapse the old gas vintage pricing structure if the Commission determined, as it did in Order 451, that new market conditions warranted such a change.[9]

[8] As explained later (*infra* p. 26), the particular modification of the vintage pricing structure implemented in Order 451 is well within the Commission's discretion. The overall "end result" of Order 451 plainly cannot be considered unjust and unreasonable because the Commission reasonably (and correctly) found that its order would increase supply and reduce overall prices.

3. This, then, is the archetypal case in which "the plain language of the statute itself . . . is sufficient to resolve the question presented." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984). But even if there were any doubt about the Commission's authority under Sections 104(b)(2) and 106(c) to set a single ceiling price for all vintages of old gas, this Court should nonetheless uphold the Commission's careful and reasoned interpretation. Under this Court's prior decisions, the Commission's interpretation of its own organic statute is controlling as long as it is "not in conflict with" or not "manifestly contrary to" the statutory language. *E.g.*, *Chevron*, 467 U.S. at 844; *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988); *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986); *Mobil Oil Co.* v. *FPC*, 417 U.S. 283, 315-17 (1974); *Permian*, 390 U.S. at 770. The Commission's interpretation of Sections 104(b)(2) and 106(c) plainly satisfies that standard.

B. The Ceiling Price Chosen By FERC Is Not Impermissible Solely By Virtue Of Its Being Higher Than The Then-Existing Spot Market Price.

Aside from its objection to the collapsing of the old gas vintage pricing structure, the majority below also objected to the ceiling price chosen by the Commission because that price was higher than the then-existing spot market price. As explained previously (*supra* pp. 9-10), that price was simply the inflation-adjusted ceiling price,

[9] The *only* respect in which the NGPA altered the Commission's authority over old gas pricing was its requirement that the Commission only increase, but not reduce, the inflation-adjusted ceiling prices established in the NGPA. That modification itself suggests that Congress did not intend to bind the Commission to historic cost ratemaking. Historic costs are fixed, by definition. Accordingly, unless the Commission used a methodology other than historic costs, it could not arrive at a new ceiling price in excess of the inflation-adjusted NGPA ceiling.

based in large part on replacement costs, that the Commission had previously set for the post-1974 old gas vintage, and which Congress had incorporated into the NGPA for that vintage.[10] The majority nonetheless opined that, because the Commission's ceiling price for old gas was somewhat higher than the then-prevailing spot market price, this ceiling price amounted to "de facto deregulation." Pet. App. 19a. This characterization is both inaccurate and legally irrelevant.

1. As a matter of fact and law, any claim that the Commission's action constituted "de facto deregulation" is nonsense. In Order 451, the Commission rejected proposals by several parties—including the Department of Justice—to deregulate old gas by removing all price controls. J.A. 170-71. Instead, the Commission set a maximum lawful price. It applied the "just and reasonable" standard, the classic tool of rate regulation. It found (correctly, in light of subsequent events) that the ceiling price it adopted would protect—indeed, benefit—consumers. See *supra* pp. 7-8 & note 3. And it retained full jurisdiction over rates so that, if necessary, it could change the regulatory system (including the rates themselves) to meet changed circumstances.

[10] The Commission's estimate of replacement costs was based upon a study the Commission had performed in connection with Opinion No. 770, and whose application in that Opinion was affirmed on appeal. *American Public Gas Ass'n* v. *FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). See J.A. 84. In Order 451, the Commission simply updated the replacement cost estimate obtained in the Opinion 770 proceeding by the inflation factor set out in Section 104 of the NGPA (15 U.S.C. § 3311(a)). J.A. 84, 252-53.

The Commission's replacement cost analysis was supported by a second study submitted by natural gas producers. This study used the most recent available data to update each of the costing elements in the study used in Opinion No. 770, and therefore did not make any separate adjustment for inflation. See J.A. 88, 253-54. It produced a slightly higher estimate—$2.77 per MMbtu rather than $2.57. The Commission, however, adopted the lower figure. J.A. 93-94.

The mere fact that the ceiling price adopted in Order 451 exceeded the then-prevailing spot market price provides no basis whatever for concluding that the Commission was engaged in "de facto deregulation." The principal role of most ceiling prices—including that established by the Commission in this case—is not to keep prices artificially low, but simply to protect consumers from excessive prices resulting, for example, from unexpected world events or from a lack of competition. J.A. 82-83.[11] The very terms "*ceiling* price" and "*maximum* lawful price" themselves imply that the market price may be lower than the regulatory ceiling. This Court's *Mobile-Sierra* doctrine— which is incorporated in Section 101 (b)(9) of the NGPA (see 15 U.S.C. § 3311)—is built upon the assumption that market rates (as reflected in arm's-length contracts) will sometimes be below ceiling prices. See J.A. 222; see also *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 343 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). Not surprisingly, therefore, ceiling prices have exceeded market prices many times during the history of natural gas regulation. See, *e.g.*, *FERC* v. *Martin Exploration Management Co.*, 486 U.S. 204, 209 (1988). Yet neither Congress nor any court (other than the court below) has ever suggested that such a result is tantamount to "deregulation."

Indeed, the ceiling price that Congress itself selected for the post-1974 old gas vintage when it enacted the NGPA has generally been higher than the spot market price since at least 1984.[12] Because the post-1974 old gas vintage did not magically become "deregulated" when the spot market price fell below the ceiling price for that

[11] The GFN process, moreover, was expressly designed to assure that old gas is "priced at the *lower* of the market or the ceiling price . . . ." J.A. 142 (emphasis added). The NGPA expressly provides that ceiling prices do not displace lower market prices agreed to by private parties. 15 U.S.C. § 3311(b)(9).

[12] Compare 18 C.F.R. § 271.101 (Table II) (1990) with EIA Report, *supra* note 3, at 33 (Table 4).

vintage, *a fortiori* the Commission's decision to apply the post-1974 ceiling price to all vintages of old gas cannot be characterized as "deregulation."

2. In any event, whether the ceiling price is above or below any "market" price is legally irrelevant under the deferential standard of review applicable to Commission rate decisions. A Commission rate order must be affirmed as long as the "end result" of the order "cannot be said to be unjust and unreasonable." *Hope*, 320 U.S. at 602. Moreover, "[t]he court's responsibility is not to supplant the Commission's balance of . . . interests with one more nearly to its liking, but instead [is] to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 308; see also *Permian*, 390 U.S. at 767, 792 (same). In this case, no one disputes that the Commission considered the relevant factors. Thus, regardless of whether the Commission's ceiling price is above or below any particular benchmark (including the market price), the only relevant question is whether the Commission's order produces an overall "end result" that is reasonable.

The "end result" of Order 451 is just and reasonable to producers and consumers alike. The Commission expressly found that the new ceiling price, which used the Commission's most conservative estimate of replacement cost (see *supra* note 10), was necessary to avoid skewing development and recovery efforts away from old gas. J.A. 24, 227-28. Specifically, the Commission found that this new ceiling would provide the market with 11 trillion cubic feet of old gas that otherwise would be lost forever, and that Order 451 would thereby save consumers approximately $25 billion. J.A. 16, 99, 259-60. The Commission also found that, although this new ceiling price might temporarily increase gas prices in a few regions where prices were artificially low, over the long run it would substantially reduce average prices to consumers. J.A. 114-25. In addition, the Commission found that other features of Order 451—such as its procedures for renegotiating outdated gas contracts (see *supra* pp. 10-11 &

note 4)—would further increase the supplies available to the market and thereby drive average prices even lower. J.A. 135-36.

These findings were not disputed by the majority below, which instead acknowledged that the end result of the Commission's order was "arguably meritorious." Pet. App. 25a. In fact, there could hardly be a more "meritorious" end result than the substantial decline in average gas prices to consumers since Order 451 went into effect. See *supra* note 3. And more important, the majority's conclusion deprived the court of appeals of any further reviewing authority: Any result that is "arguably meritorious" is, by definition, within the scope of the Commission's discretion under the just and reasonable standard, and therefore must be sustained under the end result test.

In short, the mere fact that the ceiling price adopted in Order 451 is higher than the then-prevailing spot market price is no basis for concluding that the Commission abused its discretion under the just and reasonable standard. A contrary holding—*i.e.*, that a ceiling price is impermissible merely because it exceeds a particular market price—would impose an arbitrary constraint, not only on the FERC's ratemaking powers, but also on the ratemaking powers of other regulatory agencies that regulate rates pursuant to a "just and reasonable" standard. See, *e.g.*, 47 U.S.C. § 205 (Federal Communications Commission); 49 U.S.C. § 10707 (Interstate Commerce Commission). Neither Congress nor this Court has ever suggested that a just and reasonable standard requires a ratemaking body to keep ceiling prices below market levels.

C. If Relevant At All, The Legislative History of the NGPA Fully Supports The FERC's Authority To Adopt The Old Gas Ceiling Prices It Adopted In Order 451.

The court of appeals sifted through the legislative history to find any support for its opinion that Congress, despite unambiguous language to the contrary, actually

meant to prevent the Commission from collapsing vintage pricing of old gas or from adopting a ceiling price in excess of the prevailing spot market price. The court's analysis of the legislative history is misguided in two respects. First, viewed fully and in context, the legislative history supports the Commission's interpretation. Indeed, it demonstrates that, aside from denying the Commission any authority to adopt ceiling prices lower than those specified in the NGPA (see *supra* note 9), Congress did not intend to circumscribe the Commission's traditional authority to set ceiling prices under the just and reasonable standard. Second, this Court's precedents forbid a reviewing court to rely solely upon legislative history—particularly legislative history that is at best ambiguous—to invalidate an agency's construction of its organic statute.

1. The majority relied primarily upon general remarks by members of Congress to the effect that the NGPA was not intended to abolish vintage pricing or to "deregulate" the interstate market for natural gas. Pet. App. 19a-22a & n.22. Aside from the fact that Order 451 did not "deregulate" the market for old gas (see *supra* pp. 23-26), the majority's reliance upon these remarks rests upon a fundamental logical error: Even though *Congress* did not eliminate vintage pricing in enacting the NGPA itself, it does not follow that Congress meant to strip *the Commission* of its traditional authority to respond flexibly to market conditions within the broad parameters of the "just and reasonable" standard.

The court below collapsed these issues when, for instance, it attributed to Senator Domenici the position that the "[e]limination of vintaging and deregulation of old gas [were] 'not doable' or 'ever suggested.'" Pet. App. 22a; see also *id.* (discussing statements by Sen. Jackson and Sen. Hart). Senator Domenici himself later pointed out, however, that he was addressing only claims that the NGPA represented legislative deregulation of old gas prices. J.A. 52 (letter to FERC). Moreover, he

specifically explained that the Commission retained the power to eliminate vintage pricing:

> It is my own belief that vintaging has been and continues to be a matter of policy for and by the Commission. That was the law under the NGA, and that was the state of the law at the time Congress adopted the NGPA. As such, *the Commission is free to change it—or even terminate it—at the option of a majority of the Commissioners.* Nothing in the legislative history and particularly nothing in my own statements, can be read to inhibit the Commission if it chooses to exercise that freedom.

Id. (emphasis added). See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62-63 (1987) (legislator's statement must be viewed "in context").

Several other members of Congress explicitly affirmed the Commission's broad discretion under the "just and reasonable" standard, incorporated in both the NGA and the NGPA, to adjust the ceiling prices of old gas as it saw fit. During the Senate debate on the Conference Report, for example, Senator Abourezk observed that nothing in the NGPA "prevents FERC setting the rate at whatever level is necessary actually to elicit new supply." 124 Cong. Rec. S30,018 (September 19, 1978). Senator Kennedy added:

> I want to remind Senators that the means of increasing production is already available in the form of the Federal Energy Regulatory [Commission]. Sufficient authority already exists to establish prices which will bring forth gas at a "just and reasonable" price and to vary that price according to conditions.

Id. at S30,023. Such observations refute the assertion below that Congress, by acknowledging its own unwillingness to alter the vintage pricing system in 1978, meant to narrow the Commission's traditional authority under the just and reasonable standard to set new prices for old gas in light of changing circumstances. Such an extraor-

dinary restriction on the Commission's ability to ensure just and reasonable prices would require much clearer evidence than that cited by the majority below.

The court below also cited very general comments in the legislative history to the effect that natural gas regulation should protect the consuming public. Pet. App. 20a-21a & n.22. As this Court has recently held, however, "unenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988); cf. *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) ("generalizations" in legislative history "are inadequate to overcome plain textual indication[s]"). The comments relied upon by the majority, moreover, are much too vague to override the Commission's expert opinion on the kind of regulatory system that will best protect consumer interests. Those comments certainly do not foreclose Order 451, which, as FERC prophetically concluded, protects consumers *better* than the economically obsolete vintage pricing system. In fact, such general congressional invocations of consumer interests, without more, merely underscore the Commission's claim that it—and not a reviewing court—has the institutional expertise to protect those interests. In short, nothing in the NGPA's legislative history casts any doubt upon the validity of Order 451's pricing provisions.

2. But even if the majority's reading of the NGPA were supported by some snippet of legislative history, it would be irrelevant. In *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988), this Court specified the evidence that courts may use to ascertain both "the unambiguously expressed intent of Congress" and the range of permissible statutory interpretations for purposes of the two-step analytical framework set out in *Chevron*. Under *K Mart*, the only appropriate evidence for either inquiry is the "language[] of the statute." *Id.* at 291, 292. The Court declared: "If the agency regulation is not in

conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *Id.*; see also *Chevron*, *supra*, 467 U.S. at 843 ("legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986) (same). In sum, a reviewing court may not use extra-textual speculation to invalidate an agency's reasonable statutory interpretation.

The majority below did just that. As previously shown (*supra* pp. 17-27), neither of the two pricing features of Order 451—its decision to collapse vintage pricing of old gas or its impostion of a ceiling price based upon a replacement cost approach—is in any way "in conflict with the plain language of the statute." *K Mart*, 486 U.S. at 292. Thus, the court below erred in relying upon its own interpretation of the legislative history to invalidate that order.[19]

In sum, Congress unambiguously authorized the Commission to adjust ceiling prices upward in any manner the Commission considered appropriate under the "just and reasonable" standard of the NGA. In Order 451, the Commission set a ceiling price strictly in accordance with the authority conferred in Sections 104 and 106: the price was higher than (or equal to) the NGPA ceilings; and it is "just and reasonable" as that phrase has been interpreted in this Court's precedents. Accordingly, it is the majority below, not the Commission, that has exceeded its authority by striking down an entire regulatory system based on nothing more than its own view of what Congress "intended"—but did not enact—in the NGPA. This Court should hold that the ceiling price set by the

[19] In any event, the most that the items cited by the majority conceivably could establish is that the legislative history is ambiguous. In that circumstance, *Chevron* requires a reviewing court to defer to the Commission's reasonable interpretation, even if legislative history can appropriately be considered in this context. See *supra* p. 30.

Commission was fully consistent with the requirements of the NGPA, and it should reverse the court of appeals' contrary holding.

II. THE FERC HAS AMPLE AUTHORITY UNDER SECTION 7(b) OF THE NGA TO PERMIT ABANDONMENTS GENERICALLY, WITHOUT CASE-BY-CASE ADJUDICATION.

In reviewing the abandonment provisions of Order 451, it is important to bear in mind what is and what is not at issue before this Court. The only question presented in this case is whether Order 451's abandonment *procedure* complies with the *procedural* requirements of Section 7(b). The substantive abandonment standard applied in Order 451—*i.e.*, the standard by which the Commission determined that the abandonments approved in that order would satisfy the "public convenience and necessity" requirement of Section 7(b)—is not at issue here. That standard is known as the "overall needs of the market" standard, and was adopted in *Felmont Oil Corp. and Essex Offshore, Inc.*, 33 FERC ¶ 61,333 at 61,657 (1985), *rev'd and remanded on other grounds sub nom. Consolidated Edison Co.* v. *FERC*, 823 F.2d 630 (D.C. Cir. 1987). There, the Commission rejected its prior "comparative needs" approach, which looks to the relative need for the gas of the existing customer and the customer who would be served if abandonment were granted, and determined instead that abandonment is proper if it serves the "overall needs of the market." See J.A. 147, 303. This standard has been repeatedly affirmed in the lower courts. See, *e.g.*, *Pennsylvania Public Utility Comm'n* v. *FERC*, 881 F.2d 1123, 1127 (D.C. Cir. 1989) (citing cases). In the court below, respondents did not challenge either that substantive standard or the Commission's decision to apply it in this case.

The plain language of Section 7(b) imposes only three procedural requirements for a lawful abandonment of

a service or facility subject to the FERC's jurisdiction.[14] First, the FERC must approve the abandonment. Second, the Commission must make a finding "that the present or future public convenience or necessity permits such abandonment." Third, the Commission may grant its approval only "after due hearing."

Order 451's abandonment procedures satisfy each of these requirements. First, the Commission expressly approved the abandonment. J.A. 147. Second, the Commission found that the public convenience and necessity permitted abandonment whenever a producer was unable to reach agreement with its pipeline customer on a new price. *Id.* This finding was based upon the Commission's expert judgment that the natural gas market as a whole would benefit from the increased gas supplies that would be created by the "release" to the market of the gas so affected. It is well established that "legislative facts" may be found—and determinations of the "public convenience and necessity" may be made—in a rulemaking as well as in an adjudication. *E.g.*, *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 593-594 (1981); *FPC* v. *Texaco Inc.*, 377 U.S. 33, 41-44 (1964).

Third, prior to granting abandonment and in connection with the rulemaking that led to Order 451, the Commission held both an extensive "notice and comment hearing" and an oral hearing. See *supra* p. 7. Such procedures, even without public hearings, have been held to satisfy the "hearing" requirements of numerous other federal statutes. See *United States* v. *Florida E.C. Ry.*, 410 U.S. 224, 239-46 (1973) (statutory "hearing" requirement satisfied by rulemaking); *United States* v. *Allegheny Ludlum Steel Corp.*, 406 U.S. 742, 756-58 (1972) (same); *FPC* v. *Texaco Inc.*, 377 U.S. at 41-45 (same); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) (same); see also K. Davis, *Administra-*

[14] "Abandonment," as used here, refers to the procedure by which any entity subject to the NGA, whether a producer or pipeline, is

tive Law Treatise, § 12:16 (2d ed. 1979).[15] The Commission, moreover, expressly found that any case-by-case fact-finding procedure would effectively destroy the GFN process because it would permit pipelines to prevent the reallocation of old gas by initiating proceedings which would inevitably lead to substantial regulatory delays.[16]

The court of appeals nonetheless held that, "in the instant case, the Commission has abdicated its responsibility under Section 7(b) of the NGA by providing for an across the board, pre-authorized abandonment provision." Pet. App. 29a. Although the precise basis for this holding is not entirely clear, it appears to rest upon two conclusions: (1) by virtue of Section 7(b)'s "due hearing" requirement, the Commission lacks authority to grant abandonment generically, *i.e.*, without any "factual inquiry into the circumstances" of each abandonment (*id.*; see also *id.* at 28a n.29); and (2) the Commission's procedures are inadequate because they "allow a producer, for all practical purposes, to control abandonment" and are therefore contrary to this Court's decision in *McCombs*. *Id.* at 29a; see also *id.* at 29a-30a (same).[17] Neither of these objections provides any basis for holding that the Commission's interpretation of its own statute is contrary to the procedural requirements of Section 7(b).

relieved of a service obligation under that statute. Thus, gas that is "abandoned" under Order 451 does not disappear or remain unproduced, but rather is "released" into the national gas market. See J.A. 21-23.

[15] Indeed, respondents conceded below that the "due hearing" provision of Section 7(b) does not require formal, trial-type hearings. Reply Brief of Joint Opponents, 16-18, No. 86-4940 (5th Cir.).

[16] As the Commission explained in Order 451:

> [I]t would make no sense for the Commission to require individual producers to file abandonment applications and to hold a hearing on each application. Since there are thousands of producers of old gas, that procedure could result in a vast proliferation of hearings. Given the Commission's limited resources, the inevitable result would be lengthy delays before individual abandonments could be granted. This would seriously impede the achievement of this rule's goals of increasing production of old gas and reducing overall prices.

J.A. 148. Indeed, it was for similar reasons that this Court held in *Permian* that the Commission is not required by Section 4 of the NGA to set ceiling rates on a producer-by-producer basis. See 390 U.S. at 769.

A. Section 7(b)'s "Due Hearing" Provision Does Not Require Case-By-Case Inquiry Into Each Abandonment.

The short answer to the majority's claim that the Commission failed to comply with Section 7(b)'s "due hearing" requirement is that the Commission did, in fact, hold both a notice and comment hearing and an oral hearing in conjunction with the rulemaking process that led to Order 451. See *supra* p. 7. Thus, the only question is whether, as the Commission held (see J.A. 147-48, 308-09), the "due hearing" requirement is satisfied by a hearing held in conjunction with a generic rulemaking, or whether, as the court of appeals majority believed (see Pet. App. 29a-30a), the "due hearing" requirement mandates a case-by-case inquiry into the circumstances of each abandonment. The Commission's interpretation is not only reasonable, but also correct. It is fully supported by the plain language of the statute, by this Court's prior interpretations of Section 7(b) and other analogous statutes, and by the principles that underlie

[17] The court of appeals' decision can also be read as holding that FERC lacks authority under Section 7(b) to grant abandonment in advance, *i.e.*, to "pre-grant" (*id.* at 28a, 29a) or "preauthorize[]" (*id.* at 29a) abandonment. But any such holding is squarely foreclosed by this Court's decision in *FPC* v. *Moss*, 424 U.S. 494 (1976). The Commission rule at issue there permitted the Commission to "pre-grant" abandonment at the same time as it granted permission to initiate service. Like Order 451, the purpose of the rule was to "stimulate domestic exploration and development of natural gas reserves." *Id.* at 497. This Court upheld the rule, squarely rejecting the argument that "§ 7(b) requires a public-convenience-or-necessity finding by the [Commission] at the time of the proposed abandonment." *Id.* at 499.

this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

1. The plain language of Section 7(b) is dispositive for two independent reasons. First, the word "hearing" is flexible. It encompasses a generic hearing held in conjunction with a rulemaking, a formal trial-type hearing held in conjunction with an adjudication, and anything in between. See, *e.g.*, K. Davis, *Administrative Law Treatise* §§ 12.10, 12.16. An agency's choice among these alternatives may be overturned only if it is arbitrary and capricious. *E.g.*, *Heckler* v. *Campbell*, 461 U.S. at 466-67. This choice, moreover, necessarily depends in large part upon the substantive standard being applied: A standard that turns upon concrete, specific facts (such as whether one customer or another has a greater need for a particular quantity of natural gas) generally calls for some kind of case-by-case, adjudicatory inquiry. On the other hand, a standard that turns upon broad policy judgments or upon "legislative facts" (such as whether the "market as a whole" will benefit from abandonment in certain kinds of situations) is more amenable to a generic hearing. See Davis, *supra*, § 14.3.

In this case, the Commission correctly concluded that, under the "overall needs of the market" standard, there would be no need for a case-by-case inquiry because all relevant factual questions could be resolved (and were being resolved) in the hearing the Commission had undertaken as part of the rulemaking. J.A. 147-48, 308-09. The majority below did not even dispute this conclusion, much less hold it arbitrary and capricious. The majority's rigid requirement that the Commission nonetheless must hold a case-by-case inquiry into each abandonment is inconsistent with the flexibility contained in the phrase "due hearing." [18]

[18] See also *Panhandle Eastern Pipe Line Co.* v. *FERC*, No. 89-1354, slip op. at 6 (D.C. Cir. June 29, 1990) (there is "no procedural objection to the Commission's identification of circumstances, in an otherwise valid rulemaking, which automatically trigger its approval of abandonment") (quoting *AGD* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988)).

Second, the plain language of Section 7(b) commits to the Commission (rather than a reviewing court) the authority to determine the type of hearing that is "due" in any particular case. For that reason, Section 7(b) is a classic example of a statutory provision that calls for *Chevron*-style deference to the interpretation of the agency administering the statute. See, *e.g.*, *Chevron*, 467 U.S. at 843-44; see also *Drummond Coal Co.* v. *Hodel*, 796 F.2d 503, 507 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 941 (1987) (Congress leaves gap for agency to fill when it does not "explicitly address the proper meaning of the words" used in statute). Thus, if there were any doubt as to whether Section 7(b)'s "due hearing" requirement encompasses a generic rulemaking hearing, the only question for this Court "is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

FERC's "answer" easily satisfies this standard. In Order 451, the FERC expressly interpreted Section 7(b) to permit a generic rather than case-by-case inquiry, and it held that the only hearing that is "due" in this case is the rulemaking proceeding that led to Order 451. See J.A. 308-09. That interpretation is certainly a reasonable construction of the statutory language: Nothing in the language or legislative history of Section 7(b) prohibits the Commission from relying upon a rulemaking proceeding to satisfy Section 7(b)'s "due hearing" requirement or from making its public convenience finding on a generic rather than individual basis, particularly when no issues of fact are in dispute. *E.g.*, *FPC* v. *Texaco Inc.*, 377 U.S. 33, 39-41 (1964). To the contrary, the settled meaning of the term "hearing" encompasses notice-and-comment rulemaking procedures. See *supra* p. 36. Under *Chevron*, therefore, the Commission's interpretation must be upheld.

2. The court of appeals' argument that Section 7(b) requires a case-by-case inquiry into every abandonment is also directly contrary to this Court's precedents. *First*, this Court has frequently held that an agency may satisfy "hearing" requirements contained in other statutes through rulemaking rather than case-by-case inquiry. In *FPC* v. *Texaco*, for example, this Court held that the Commission need not hold a case-by-case hearing under Section 7(c) of the NGA, pertaining to certificates of public convenience and necessity, if in a previous rulemaking proceeding the Commission had determined that it would automatically deny certificate applications containing impermissible pricing provisions. 377 U.S. at 39-41. The Court declared that "the statutory requirement for a hearing under Section 7 does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who [do not] measure up to them." *Id.* at 39. See also *Shell Oil Company* v. *FPC*, 520 F.2d 1061, 1074-75 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976) (nationwide ratemaking process by rulemaking did not violate hearing provisions of APA).

Similarly, this Court held in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956), that the Federal Communications Commission may summarily deny certain license applications under § 309(b) of the Federal Communications Act, without a fact-finding hearing, on the basis of standards established in rulemaking proceedings. The Court reached this conclusion even though Section 309(b) by its terms requires the agency to "formally designate the application for hearing" before the application can be denied. *Id.* at 195-96 n.5. If a regulatory agency has authority not to hold a case-by-case inquiry when the statute by its terms appears to require one, *a fortiori* the agency has that authority when the statute explicitly gives it discretion to determine what kind of "hearing" is "due."

Second, the majority's interpretation of Section 7(b), requiring a case-by-case inquiry with respect to each

abandonment, is contrary to the reasoning of *FPC* v. *Moss*, 424 U.S. at 496. The rationale for a case-by-case inquiry is that it ensures that the Commission's judgment about the merits of the abandonment will be based upon presently verifiable facts rather than generalized judgments. See Respondents' Brief in Opposition to Certiorari at 26. In *Moss*, however, this Court held that Section 7(b) permits the Commission to authorize abandonment years before the abandonment is to take place. That holding necessarily means that the Commission may rely upon predictive judgments about the likely effects of an abandonment—such as its effects on the "overall needs of the market"—rather than presently verifiable facts. See also *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961); *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). Given that *Moss* permits the Commission to rely solely upon general, predictive judgments about the likely effects of an individual abandonment, there is no reason why the Commission should not be permitted to rely upon general, predictive judgments about the likely effects of a *class* of abandonments, at it did here.[19]

[19] In the court below and in their opposition to certiorari, respondents also relied upon *United Gas Pipe Line Co.* v. *McCombs*, 442 U.S. 529 (1979), in support of their argument that Section 7(b) requires a fact-specific inquiry with respect to each abandonment. Any such reliance is misplaced. The holding of *McCombs* is that any abandonment must have Commission approval to be lawful under Section 7(b), not that the Commission must conduct a fact-specific inquiry. 442 U.S. at 537. And *McCombs* did not hold that the Commission is *precluded* from making an abandonment decision based upon "a hypothetical set of facts," as respondents have claimed. See Respondents' Brief in Opposition to Certiorari at 26 (quoting 442 U.S. at 540). Rather, the Court held that the Commission "did not abuse its *discretion* in declining" to grant abandonment retroactively, in part because retroactive approval would require the Commission "to determine on a hypothetical set of facts what action it would have taken" if an application had been filed prior to abandonment. 442 U.S. at 540 (emphasis

3. Given the complete absence of statutory support for its position, the court of appeals' argument that the Commission must examine each abandonment individually flouts the general principles underlying *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). There, this Court warned reviewing courts against "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Id.* at 525. The procedural requirement that the court below engrafted onto Section 7(b) undermines the Commission's decisionmaking process in two essential respects.

First, the authority to exercise its powers generically is critical to the Commission's ability to carry out its regulatory mission. The Commission has traditionally employed broad regulatory measures akin to Order 451 in response to large swings in the price and supply of the Nation's natural gas.[20] In this case, moreover, the Commission expressly found that case-by-case factual inquiries would destroy the effectiveness of Order 451 in fostering competition and thereby increasing the supply of natural gas. See *supra* note 16. As it was in *Permian*, this Court should be reluctant to "prohibit administrative action imperative for the achievement of an agency's ultimate purposes." 310 U.S. at 780.

added). Thus, *McCombs* itself confirms that the procedures to be used in determining the propriety of abandonment rest squarely within the Commission's discretion.

[20] In Order 436, for example, the Commission imposed an "open access" requirement upon all pipelines wishing to transport gas under a blanket certificate under Section 7(c) of the NGA, without conducting any inquiry into whether such a requirement would be justified on the basis of specific facts and circumstances. 50 Fed Reg. 42,408 (1985), *vacated and remanded on other grounds sub nom. Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). See also *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) (upholding FERC Order 380 summarily striking "minimum bill" provisions from contracts between pipelines and their wholesale customers).

Second, the case-by-case inquiry requirement imposed by the court of appeals would serve no purpose beyond delay. Unlike the Commission's prior "comparative needs" standard, the "market as a whole" standard applied in Order 451—and not challenged in the court below—does not turn upon the facts surrounding each individual abandonment. See *supra* p. 32. Thus, to require that the Commission make an inquiry into the facts of each abandonment permitted by Order 451 is to require either (a) that the Commission modify or overrule its concededly proper substantive abandonment standard, or (b) that for each case it conduct a useless, time-consuming inquiry that will have no bearing upon any ultimate decision.[21] But a reviewing court may not force the Commission to change its abandonment standard under the guise of a "procedural" requirement without a finding (which was not even sought by respondents below) that the standard itself is arbitrary and capricious or otherwise unlawful. And the principles of *Vermont Yankee* plainly preclude the imposition of a procedural requirement not clearly mandated by the agency's organic statute. As this Court explained in *Texaco*,

> To require the Commission to proceed only on a case-by-case basis would require it . . . to repeat in hearing after hearing its conclusions that condemn all of [the applications covered by the generic order] . . . . We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled. 377 U.S. at 44 (citations omitted).

[21] Of course, nothing in Order 451 precludes a hearing if factual disputes arise as to whether the requirements for abandonment—compliance with the GFN procedure—have been satisfied. J.A. 295-97. The 30-day notice requirement in the GFN procedure (*id.* at 296) is ample time to permit a purchaser to file a complaint under the Commission's rules. See 18 C.F.R. § 385.206. To petitioners' knowledge, however, no one has ever filed a complaint or sought a hearing on the ground that either a producer's or a pipeline's alleged failure to comply with the GFN requirements rendered a proposed abandonment unlawful.

Accord *Heckler* v. *Campbell*, 461 U.S. at 467. Nothing in the language or history of Section 7(b) provides any more reason to impose a case-by-case inquiry requirement here.

B. Order 451's Abandonment Procedure Cannot Be Invalidated Based Upon A Reviewing Court's Judgment That It Gives The Producer Excessive Control Over The Abandonment Decision.

The court of appeals also read this Court's decision in *McCombs* as foreclosing the Commission's use of its abandonment authority under Section 7(b) whenever, *in the opinion of a reviewing court*, the procedures leading to abandonment "appear" to give undue "control" over the abandonment decision to the producer. The majority's analysis is both legally irrelevant and factually incorrect.

1. The majority's "excessive producer control" analysis is incorrect as a matter of law, for three reasons. First, it rests upon a misinterpretation of *McCombs*. *McCombs* involved a blatant attempt to circumvent the plain language of Section 7(b) requiring Commission approval for an abandonment. 442 U.S. at 537. In explaining why *Congress* had imposed that requirement, this Court noted that, without Commission approval, "the abandonment determination would rest, as a practical matter, in the producer's control, a result clearly at odds with Congress's purpose to regulate the supply and price of natural gas." *Id.* at 539. But this passage neither suggests nor holds that a reviewing court may second-guess an express grant of abandonment by the Commission, made under a permissible substantive standard, on the ground that the conditions imposed by the Commission give the producer undue control over the abandonment decision. See also *Panhandle Eastern Pipe Line Co., supra*, slip op. at 6 (expressly disagreeing with interpretation of *McCombs* by majority below).

Second, the majority's interpretation of *McCombs* would require this Court to overrule *Moss*. As Chief Justice Burger pointed out in that case, the pre-authorized aban-

donment procedure approved in *Moss* gave the producer *complete* discretion to determine, at the expiration of its contract with the customer, whether to abandon service or to continue it on the same terms. *FPC* v. *Moss*, 424 U.S. 494, 505 (1976) (Burger, C.J., concurring). In contrast to Order 451 (see *infra* pp. 45-46), the rule at issue there provided *no* mechanism by which the customer could force the producer to continue service. *Id.* at 505-06. If, as the majority suggested, Section 7(b) required a reviewing court to invalidate any particular pre-granted abandonment mechanism that gives "too much" control to a producer, the mechanism approved in *Moss* would plainly have been invalid. But nothing in *McCombs* suggests that the Court was attempting *sub silentio* to overrule *Moss*.

Third, the majority's reading of *McCombs* would require this Court to ignore well-established principles of statutory construction. In the majority's view, Congress's "purpose" (Pet. App. 30a) was to ensure that the Commission not only would determine whether an abandonment is legally *permissible* (which it obviously did here with respect to all abandonments that occur pursuant to Order 451), but also would exercise sufficiently close supervision so that it, rather than the producer or the pipeline, would "for all practical purposes . . . control" whether each individual abandonment actually occurs. Pet. App. 29a. But nothing in the language of Section 7(b) supports the imposition of this additional requirement on the Commission. For that reason, the majority's "excessive producer control" argument contravenes this Court's consistent teaching that a statute's terms cannot properly be limited or expanded solely with reference to a reviewing court's opinion of the general congressional purpose that underlies the statute. *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987); *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 n.33 (1976). And, because the Commission expressly and reasonably rejected this interpretation of Section 7(b) (see J.A. 306-07), the majority's at-

tempt to engraft an "excessive producer control" limitation on that provision is also contrary to the deference principles embodied in *K Mart* and *Chevron*. See *supra* p. 17.

In short, the court of appeals erred in construing *McCombs* to hold that a reviewing court may substitute its judgment for the Commission's whenever it concludes that a particular abandonment procedure gives "too much" control to the producer. Congress has entrusted such policy judgments to the Commission, not the judiciary. *E.g.*, *Chevron*, *supra*, 467 U.S. at 864 ("policy arguments are more properly addressed to legislators or administrators, not to judges"); *PBGC* v. *LTV Corp.*, No. 89-390, slip op. at 16 (June 18, 1990) ("judgments about the way the real world works that have gone into the [agency's] policy are precisely the kind that agencies are better equipped to make than are the courts").

2. Although not relevant to the legal issues before this Court, the majority's views about the GFN procedure are simply incorrect. The GFN procedure is by no means "one sided," as the majority erroneously claimed.[22] Nor does it give the producer "undue" control over the abandonment decision. As this Commission found, abandon-

[22] This claim ignores the Commission's determination, after careful study, that market forces would operate to reduce the purchasers' high-cost gas burdens because gas "released" to the national gas market under Order 451 would increase supplies and thereby drive overall prices down. J.A. 119-36, 147, 319-21. It also ignores the fact that the GFN procedure permits pipelines to escape contractual obligations to purchase gas they no longer want. And it ignores the fact that the GFN process allows a pipeline to abandon its purchase of any high-cost gas covered by contracts that also provide for the sale of old gas (*i.e.*, "multivintage" contracts). J.A. 150. Finally, it ignores the fact that the GFN procedure expressly gives the customers of a non-"open access" pipeline a right of first refusal to purchase the gas released as a result of the GFN procedure. J.A. 154-55. For these reasons, the Commission reasonably determined that the GFN procedure was balanced and fair to pipelines, producers and end users alike. J.A. 153-55, 319-25.

ment can occur under the GFN procedure "only through the parties' *mutual* exercise of their rights" under that procedure. J.A. 312 (emphasis added); see also J.A. 321. To be sure, the producer must initiate the process. But once it is initiated, Order 451 permits abandonment only on two conditions, both of which are largely in the pipeline's control.

First, no abandonment can occur unless the pipeline refuses to offer an acceptable below-ceiling price that reflects the market value of gas sold under a contract that is comparable (in duration, for example) to the pipeline's contract with the producer. As the Commission found, a producer "is unlikely to sell to another purchaser unless it finds one willing to offer a better bargain than the existing purchaser." J.A. 153. In practice, moreover, the vast majority of pipelines have been able to negotiate market prices for the gas they wished to retain—and to release gas that they deemed to be in excess of their system requirements—*without* any resort to the GFN procedure. *E.g.*, *Natural Gas Policy Act: Hearings on H.R. 1595 Before The Subcomm. On Energy And Power Of The House Committee On Energy And Commerce*, 101st Cong., 1st Sess. 156 (April 5, 1989). That outcome is consistent with the Commission's prediction—and stated desire—that the formal GFN procedure would be unnecessary in most cases. *E.g.*, J.A. 163, 296.

Second, even if the parties are unable voluntarily to agree on a new price, no abandonment can occur unless the pipeline refuses to purchase the gas at the price provided in its contract with the producer. The only circumstance in which the producer may invoke the GFN procedure at all is where the contract between the producer and the pipeline contains a price escalation provision that pegs the contract price to the alternative maximum price adopted by the Commission. J.A. 149.[23]

[23] Understood in that light, the GFN procedure substantially *limits* the producer's well-established right to seek abandonment of

The GFN procedure, in turn, permits abandonment only when the pipeline does not offer to buy the gas at the new contract price. J.A. 149, 296, 321. If the pipeline offers to pay the contract price, it has an absolute right to retain the gas. Thus, as the Commission expressly found, any abandonment of service under the GFN procedure "results from the *purchaser's* decision to offer a price lower than that provided by the contract." J.A. 312 (emphasis added).

It is thus simply absurd to claim, as the majority did, that Order 451 "allow[s] a producer . . . to control abandonment. . . ." Pet. App. 29a. But if there were any doubt on the matter (and if the question were legally relevant, see *supra* pp. 42-44), the Commission's contrary conclusion is entitled to the utmost deference, see *Chevron*, *supra*, 467 U.S. at 864; *PBGC* v. *LTV Corp.*, *supra*, slip op. at 16; and can be reversed only if it is irrational or arbitrary, see, *e.g.*, *Bureau of Alcohol Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 98 n.8 (1983). The court of appeals failed to demonstrate that the Commission's assessment was even arguably incorrect, much less irrational.

III. FERC NEED NOT RESOLVE THE TAKE-OR-PAY ISSUE AS A PRECONDITION TO ITS EFFORTS TO RESOLVE THE PROBLEM OF OLD GAS PRICING.

The court below erred in suggesting that the Commission must resolve the take-or-pay issue as a prerequisite to its efforts to deal with the pricing of old gas.[24]

the producer's service obligation—and to sell the gas so "released" to another customer—whenever a customer refuses to pay the contract price. See, *e.g.*, *National Fuel Gas Supply Corp.*, 48 FERC ¶ 61,195 (1989) (granting abandonment because, *inter alia*, purchaser failed to pay contract price); *Northern Natural Gas Co.*, 41 FERC ¶ 61,116 at 61,279 (1987) (same).

[24] In their opposition to certiorari, respondents vigorously contended that the court of appeals' discussion of the take-or-pay issue was merely precatory. See Respondents' Opposition to Certiorari at 28-29 (filed May 14, 1990). Petitioners would accept that characterization of the decision below, so long as it is clear from this Court's decision that the Commission is not obligated to address further or to resolve the take-or-pay issue as a condition of Order 451's validity.

The court simply ignored the Commission's determination (J.A. 67-68, 293-95), that the take-or-pay issue is better addressed in the ongoing proceedings devoted entirely to that issue.[25]

It is well established that whether an agency must address discrete regulatory concerns in the same proceeding is a matter firmly committed to the discretion of the agency, not a reviewing court. This Court's decision in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 49 (1968), which specifically affirmed the FPC's discretion to address take-or-pay issues in one set of proceedings rather than another, is a classic illustration of this principle. That principle comports with the Court's traditional deference both to an agency's choice of rulemaking procedure, see *Vermont Yankee Nuclear Power Co.* v. *NRDC*, 435 U.S. 519, 543-54 (1978), and to an agency's generally unreviewable discretion to manage its priorities as it sees fit, see *Heckler* v. *Chaney*, 470 U.S. 821, 831-32 (1985). It also comports with practical necessity: As this Court has long recognized with respect to legislative action, "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. . . . [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); see also *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981).

Accordingly, an agency's discretion to order its priorities as it wishes (see *Heckler*, 470 U.S. at 831-32) should be limited, if at all, only when two issues are so inex-

[25] As previously noted, the Commission is addressing the take-or-pay issue in its Order 436/500 proceedings. See *American Gas Ass'n* v. *FERC*, 888 F.2d 136 (D.C. Cir. 1989); *Tennessee Gas Pipeline Co.* v. *FERC*, 871 F.2d 1099, 1106 (D.C. Cir. 1989); Pet. App. 56a (Brown, J., dissenting).

tricably related that separate treatment would pose an almost certain risk of inconsistent standards or outcomes.[26] The court below, however, did not find (and could not have found) that the take-or-pay issue was so inextricably related to the problem of old gas pricing that the latter could not rationally be addressed without resolving the former. The closest the majority came was the unsupported and irrelevant contention that Order 451 "exacerbat[es]" the take-or-pay issue. Pet. App. 33a.

The Commission, however, reasonably concluded that Order 451 would do far more to resolve the take-or-pay issue than it would do to exacerbate it. J.A. 114-23, 287-95. By increasing the price of some old gas, Order 451 may raise the price that some pipelines must pay under some take-or-pay provisions. See, *e.g.*, J.A. 294. But, by increasing the overall supply of natural gas, Order 451 will decrease the overall market price of all gas, and thereby reduce the pipelines' aggregate liability on most take-or-pay obligations. See J.A. 293-94. In addition, Order 451 provides powerful incentives for producers and pipelines to reduce take-or-pay obligations voluntarily.[27]

[26] That is the standard employed, for example, by the D.C. Circuit. *E.g.*, *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1159-60 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) (upholding FERC's discretion not to address take-or-pay issue in "minimum bill" proceeding); *Neighborhood TV Co.* v. *FCC*, 742 F.2d 629, 642-43 (D.C. Cir. 1984) (upholding FCC's discretion to separate its consideration of two related but discrete issues); see also *ITT World Communications, Inc.* v. *FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984).

[27] First, "since there will no longer be an old-gas cushion available to protect high-priced contracts through rolled-in-pricing, both pipelines and producers will find it mutually advantageous to renegotiate such contracts in order to retain a market for their supplies in the face of competition from cheaper gas and alternate fuels." J.A. 121-22. Second, for multi-vintage contracts containing old gas, FERC's GFN process effectively enables a pipeline to refuse to pay more for old gas unless the producer reduces or eliminates the pipeline's take-or-pay obligations. See J.A. 122, 293-94.

But even if, contrary to the conclusion of the expert agency charged with making such judgments, the elimination of vintage pricing does "exacerbate" the take-or-pay issue, it does not follow that the agency must undertake to resolve both issues in the same proceeding. The fact that a regulatory program designed to resolve one important problem might "exacerbate" another problem does not mean that the agency is thereby disabled from resolving the first problem without simultaneously resolving the second. See, *e.g.*, *Neighborhood TV Co.*, 742 F.2d at 643 (even though FCC licensing of low power TV stations interfered with sheriff's radio communications, agency could defer resolution of that problem to another proceeding). Because the economic interrelationships within a regulated industry are frequently both extensive and complex, a contrary view would reduce regulatory agencies to paralysis. Cf. *Heckler*, 470 U.S. at 831-32.

Finally, and most important, the relationship between the take-or-pay issue and the Commission's elimination of vintage pricing is not at all "inextricable." Assigning the two issues to different proceedings will not lead to inconsistent results. And the two issues are no less severable than most other important issues within the Commission's natural gas jurisdiction. Any requirement that the Commission fully resolve the take-or-pay question as a condition of Order 451's validity is a plain and unwarranted interference with the Commission's authority to control its own docket, and must be set aside.[28]

This feature of the GFN process has already relieved pipelines' take-or-pay obligations in 33% of the contracts renegotiated under Order No. 451. *Natural Gas Policy Act: Hearings on H.R. 1595 Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 158-59 (April 5, 1989); see also J.A. 121 (detailing dramatic reductions in take-or-pay liabilities in specific settlements).

[28] In the court of appeals, respondents also challenged certain mandatory transportation provisions in Order 451 on the ground that they improperly imposed "common carrier" obligations on the

CONCLUSION

The judgment of the court of appeals should be reversed.

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August 9, 1990

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pipelines. Pet. App. 33a-36a. The panel majority agreed, although it noted that the issue had diminishing practical signficance. Pet. App. 33a & n.34. By its terms, Order No. 451's transportation requirements apply *only* if the pipeline has not already filed for an open access certificate under Order No. 436. *E.g.*, J.A. 45, 177-78. All of the pipelines that were petitioners below have now sought and been granted open access certificates, thereby mooting this issue. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

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